BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROGER T.W. HILL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,019,074
KIRK KINAST	)	
Uninsured Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appeals the June 27, 2007 Award of Administrative Law Judge Bruce E. Moore. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that travel was not inherent in this employment. Additionally, the ALJ found that claimant's travel encompassed a major deviation in purpose when claimant and Martin Peterson, a person claimant identified as his supervisor, bought beer to consume on the trip home, thereby deviating from the normal route, to follow winding dirt roads. Mr. Peterson was identified by Kirk Kinast, respondent, as an employee of respondent.

Claimant appeared by his attorney, Matthew L. Bretz of Hutchinson, Kansas. Respondent appeared not. The Kansas Workers Compensation Fund (Fund) appeared by its attorney, Kendall R. Cunningham of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on October 2, 2007.

ISSUES

The parties stipulated, at oral argument to the Board, that notice was timely provided by claimant to respondent, pursuant to K.S.A. 44-520a(b). It was further stipulated that respondent is insolvent and is unable to pay any of claimant's workers compensation benefits. Additionally, it was stipulated that, pursuant to K.S.A. 44-505(a)(2), respondent was subject to the provisions of the Workers Compensation Act, having a payroll for the year 2003 in excess of $20,000.00. These issues were originally resolved by stipulation

before the ALJ, as noted in the Award on page 7, but nevertheless, were raised to the Board in claimant's Brief On Appeal, filed on August 10, 2007. During oral argument before the Board, the extent of the parties' stipulations was clarified and the issues before the Board on appeal were narrowed to the following:

1. Did the ALJ err in determining that claimant failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment? The parties agreed at oral argument to the Board that claimant had suffered an accidental injury. However, respondent contends the accident did not arise out of and in the course of claimant's employment, but was an accident which occurred while claimant was on a major deviation from the normal route to claimant's home in Hutchinson, Kansas.

2. Was claimant an employee of respondent at the time of the accident? Respondent contends that claimant was no longer an employee at the time of his injuries. Respondent alleges claimant's employment ended at 3:00 p.m. on the date of accident, when the job was concluded. Claimant contends that his employment started in Hutchinson, Kansas, and would not end until he returned home to Hutchinson from Liberal, Kansas, where the job was actually performed.

3. Was travel an inherent part of claimant's job so as to make the accident, which occurred while claimant was traveling home to Hutchinson, Kansas, compensable?

4. Was timely written claim submitted? Claimant argues that under K.S.A. 44-520a(b), the statute of limitations to file the required written claim was tolled until the determination regarding claimant's entitlement to PIP benefits was reached and the decision from the District Court of Reno County, Kansas, was rendered and filed on November 17, 2004. Respondent argues that the provisions of K.S.A. 44-520a(b) do not apply to this circumstance.

5. What is the nature and extent of claimant's injuries and disability? The parties acknowledge that the only impairment rating contained in this record is that of Lee R. Dorey, M.D. Additionally, as noted in the Award, claimant alleges entitlement to 54 weeks of temporary total disability (TTD) for the period from September 12, 2003, to September 28, 2004. However, no determination regarding TTD or the appropriate impairment to be awarded claimant, should one be determined due, was included in the Award. Should the Board determine an award is appropriate, this matter will be remanded to

the ALJ for a determination of the appropriate amount of award, including any permanent partial disability compensation and TTD which may be due.

6. Is claimant entitled to past, present and future medical treatment for the injuries suffered on September 12, 2003?

FINDINGS OF FACT

Claimant was hired in Hutchinson, Kansas, by respondent's siding company as a laborer. Claimant lived in Hutchinson, Kansas, and respondent was a company headquartered in Hutchinson, Kansas, at the time of hire, but the job for which claimant was hired was in Liberal, Kansas. Respondent was aware at the time of claimant's hire that claimant had no drivers license and would need a ride to and from Liberal. Respondent's employees would work all week, Monday through Friday, in Liberal and then go home on the weekend. It was not required that the employees go home on weekends, as respondent had rented an apartment in Liberal, where they stayed during the week. The workers were welcome to stay in the apartment on the weekend if they wanted. Claimant occasionally availed himself of this offer. Respondent, Kirk Kinast, provided rides for many of the workers in his club cab pickup. His extended cab pickup had room for six to eight people. Claimant initially rode with Mr. Kinast, but soon began riding with Martin Peterson. Mr. Kinast testified that claimant chose to ride with Mr. Peterson because Mr. Peterson would allow beer drinking during the trips and Mr. Kinast would not. The workers were not paid for their travel to and from Liberal either in mileage or by the hour. They were expected to be at work at 8:00 a.m. on Monday and worked until 5:00 p.m. on Friday. Whether they stayed in Liberal or returned to Hutchinson on the weekends was their choice.

By Friday, September 12, 2003, respondent had determined the job in Liberal was a money loser. Mr. Kinast terminated the contract on the siding work and informed the workers that the job ended as of 3:00 p.m. that Friday. The workers were welcome to return to Hutchinson with Mr. Kinast or arrange rides home in any fashion they wished. Claimant decided to ride with Mr. Peterson, because he wanted to drink beer on the trip home. After the work ended on that Friday, claimant and Mr. Peterson went to their apartment and packed. While there, they drank a few beers. They left Liberal at around 6:00 or 6:30 p.m. The first part of the trip was on Highway 54, the normal route. When they arrived in Bucklin, Kansas, they stopped for more beer and then departed for Hutchinson. The normal route would have taken them east on Highway 54. However, on this particular day, claimant and Mr. Peterson decided to take an alternate route, one they had never taken before. This route caused them to veer off the main highway and onto dirt roads on their way to Hutchinson. While on these dirt roads, Mr. Peterson tried to navigate a corner at too high a speed and they were involved in a one vehicle accident. Claimant

suffered significant injuries from that accident. The accident report indicated the accident occurred at approximately 10:00 p.m. The Highway Patrol accident report indicated the discovery of numerous full and empty cans of beer, still cold to the touch, near the accident scene. There was a strong odor of alcohol both at the scene and inside the car. Additionally, the report indicated that both Mr. Peterson and claimant appeared intoxicated to the investigating officer. Blood alcohol tests administered at the hospital noted Mr. Peterson's blood alcohol to be .11.[1] Because claimant was a passenger in the automobile, no testing was done on him.

Claimant was treated at the Hutchinson Hospital on September 12 and 13. He was later referred for additional treatment to board certified orthopedic surgeon Lee R. Dorey, M.D., with the first examination on December 11, 2003. Claimant described low back and right shoulder pain and was ultimately diagnosed with cervical and lumbar sprains, a compression fracture of L1 and lumbar disc internal derangement and instability at L4-5, and a right shoulder contusion with a torn rotator cuff. Claimant was also diagnosed with hypertension, which was not related to the accident. Claimant was referred to Dr. Lynch at The Pain Management Center for epidural cortisone injections.

Claimant was, later, referred to board certified orthopedic surgeon Erik L. Severud, M.D., for treatment of his shoulder, with surgery being performed on May 19, 2004. The surgery included repair of the torn rotator cuff and a frayed labrum. Claimant was released without restrictions from Dr. Severud's care on October 26, 2004. Dr. Severud provided a rating for claimant's condition, but that rating is not contained in this record. Before claimant underwent the shoulder surgery, he was referred by Dr. Severud to board certified cardiologist T. K. Reddy, M.D., for an evaluation of claimant's heart condition. This was a standard preoperative cardiovascular evaluation done in anticipation of claimant's shoulder surgery.

Claimant returned to Dr. Dorey for a follow-up evaluation and rating on December 7, 2006. Dr. Dorey assessed claimant a functional impairment rating to the right shoulder of 1 percent for lack of adduction and 1 percent for lack of abduction, 1 percent for lack of full flexion, and 1 percent for lack of extension, with all ratings to the upper extremity and pursuant to the fourth edition of the AMA *Guides*.[2] Dr. Dorey rated claimant at 20 percent to the lumbar spine, finding claimant fell within DRE Lumbosacral Category IV of the fourth edition of the AMA *Guides*. When combined, claimant's shoulder and lumbar spine ratings equated to a 22 percent permanent partial whole body disability. Dr. Dorey's are the only ratings in this record. Claimant was restricted from prolonged overhead work due to his shoulder problems. He was to avoid repetitive bending and lifting, with no lifting

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[1] R.H. Trans., Cl. Ex.2.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

from knuckle height to his shoulders over 60 pounds and no lifting over 35 pounds from ground level.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

It is not disputed that claimant suffered an accidental injury on the date alleged. The dispute is whether that accident arose out of and in the course of claimant's employment. It is also not disputed that the labors of the day were ended at the time of the accident. The allegation by claimant deals with the return trip to claimant's home in Hutchinson, Kansas, from the work site in Liberal, Kansas. The initial defense from respondent was that claimant was no longer an employee at the time of the accident since, according to

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[3] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

respondent, the job had ended at 3:00 p.m. However, in this instance, the claimant was hired at his home in Hutchinson to work in Liberal. Thus, the contract for hire, in this instance, would not conclude until claimant returned to his home in Hutchinson, Kansas.

Respondent next argues the accident is covered by the "going and coming" rule because claimant was going home after leaving the job.

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.[7]

> The rationale for the "going and coming" rule is that while on the way to or from work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[8]

> The "going and coming" rule is based upon the premise that, while on the way to or from work, the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Therefore, such risks are not causally related to the employment.[9]

There is an exception to the "going and coming" rule when travel upon the public roadways is an integral or necessary part of the employment.[10]

Claimant argues that travel, in this instance, was an integral or necessary part of the employment. Respondent counters that this case is controlled by *Butera.*[11] In *Butera*, the claimant was hired to work for the respondent at the Wolf Creek Nuclear Operating Corporation facility, near Burlington, Kansas. This was far from his primary residence in

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[7] K.S.A. 2003 Supp. 44-508(f).

[8] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[9] *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 289, 144 P.3d 668 (2006).

[10] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[11] *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

Cabool, Missouri, a distance of 360 miles. Butera took up residence at a hotel in Garnett, Kansas, a 30-minute drive from Wolf Creek. While driving from the hotel to the plant, Butera was involved in an automobile accident. The Court found that a fixed-situs employee, who travels to the job site, would not be in the course of his employment during the travel. The reason being "the Act excises this activity from the scope of compensation in order to keep the employer's burden manageable".[12] However, claimant, in this case, was not inured while traveling from the hotel to the work site. Instead, he was injured on his way home. The *Butera* Court did note that Butera was paid mileage for the initial journeys from Missouri to the work site. If Butera had been injured on one of those trips, "he would have a good argument for compensation because the special purpose of those trips was to lay groundwork for the job."[13]

A case similar to the one at hand is *Kindel*.[14] In *Kindel*, the claimant and a supervisor were returning home to Salina, Kansas, from a construction site in Sabetha, Kansas. They were traveling in a company truck. On the way home, they stopped at a bar for approximately four hours. They then returned to the normal route home, on Interstate 70. At some point before 8:50 p.m., they were involved in an accident. The Kansas Supreme Court, in analyzing the "going and coming" rule, determined that the claimant's injuries arose out of and in the course of his employment, notwithstanding the amount of time spent at the bar. At the time of the accident, claimant and the supervisor had resumed the route home. The Court determined that there was no arbitrary limit on the number of hours of deviation, "which may be terminated with travel coverage resumed".[15]

Another situation similar to this case is discussed in *Messenger.*[16] In *Messenger*, the claimant was killed while traveling home from a distant well site. The Kansas Court of Appeals noted in *Messenger* that:

> Kansas has long recognized one very basic exception to the "going and coming" rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.[17]

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[12] *Id.* at 546.

[13] *Id.* at 547.

[14] *Kindel, supra.*

[15] *Id.* at 284.

[16] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[17] *Id.* at 437.

The Court in *Messenger* noted that it was customary in the oilfield industry for the employer to pay the driller to drive and to transport his crew. The Court in *Messenger* found that both the employer and the employee benefitted from the transportation arrangement, just as this claimant and respondent benefitted from the travel arrangements between Liberal and Hutchinson. The Board finds that travel was an intrinsic part of the job in this instance.

The Board must next decide whether claimant submitted timely written claim pursuant to K.S.A. 44-520a.

> Where recovery is denied to any person in a suit brought at law or in admiralty or under the federal employers' liability acts to recover damages in respect of bodily injury or death on the ground that such person was an employee and the defendant was an employer subject to and within the meaning of the workmen's compensation act, or when recovery is denied to any person in an action brought under the provisions of the workmen's compensation law of any other state or jurisdiction on the ground that such person was an employee under and subject to the provisions of the workmen's compensation act of this state, the limitation of time prescribed in subsection (a) of this section shall begin to run only from the date of termination or abandonment of such suit or compensation proceeding, when such suit or compensation proceeding is filed within two hundred (200) days after the date of the injury or death complained of.[18]

Claimant filed an action in the District Court of Reno County, Kansas, against Progressive Casualty Insurance Company, seeking recovery of benefits through Personal Injury Protection (PIP) coverage against what appears to have been the automobile policy of Martin Peterson. The Journal Entry filed November 17, 2004, determined that claimant was entitled to recover benefits pursuant to the Kansas Workers Compensation Act. Claimant was denied any recovery for PIP benefits as the result of that legal action. Claimant's Application For Hearing (E-1) was filed on September 13, 2004, before the Journal Entry was entered in Reno County. Thus, the written claim was filed timely, pursuant to K.S.A. 44-520a(b).

The Board must next decide if the excursion onto the dirt roads after leaving Bucklin constituted a major deviation from the business purpose of this trip.

> In the case of a major deviation from the business purpose, most courts will bar compensation recovery on the theory that the deviation is so substantial that the employee must be deemed to have abandoned any business purpose and

[18] K.S.A. 44-520a(b)

> consequently cannot recover for injuries received, even though he or she has ceased the deviation and is returning to the business route or purpose.[19]

The circumstances that led claimant to, and the location of this accident compel the Board to deny compensation. This had become more of a beer drinking joyride for this claimant than it was travel home.

> An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto.[20]

A case nearly on point is *Woodring.*[21] *Woodring*, as discussed at length in *Sumner*, involved a traveling salesman who operated from Salina, Kansas, and traveled to surrounding cities for his employer. On one occasion, Woodring was directed to meet a person in Enterprise, Kansas, about 30 miles from Salina, to obtain measurements for special jambs and window frames. The salesman went out of his way to pick up three friends and then stopped in Enterprise to meet the business contact. When he discovered the contact was actually 5 to 6 miles away in Abilene, Kansas, the salesman made no further effort to contact the client, instead taking his friends to a drinking establishment. The salesman was injured when his car overturned during an accident on the way home to Salina. The Court in *Woodring* found that the salesman's business errand was finished or abandoned when he pursued his own pleasure. The Court noted that "there is no theory of law or of justice which would impose on his employer the obligation to pay compensation for any injury sustained by the workman . . . ."[22]

Here, this claimant wanted to ride with Mr. Peterson because he could drink beer while traveling on Kansas roads and highways. The fact that those activities are against Kansas law, not to mention incredibly dangerous to both the drinkers and any innocent and unsuspecting travelers on those same roads, did not deter this claimant. In *Kindel*, the business purpose was not fully abandoned and the claimant had clearly resumed the purpose of returning home when the accident occurred. Here, the accident occurred on a dark country road, at 10 o'clock at night, when Mr. Peterson and claimant appeared to be avoiding the best and safest route home in order to inconspicuously violate Kansas drinking and driving laws. Any business purpose connected with this trip had been

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[19] *Kindel* at 284.

[20] *Sumner, supra,* at 288, citing 1 Larson's Workers' Compensation Law § 12, p. 12-1 (1999).

[21] *Woodring v. United Sash & Door Co.*, 152 Kan. 413, 103 P.2d 837 (1940).

[22] *Id.* at 418.

abandoned when claimant and Mr. Peterson left the paved roads for the more dangerous dirt roads for the specific purpose of consuming alcohol.

> A deviation from the employer's work generally consists of a personal or nonbusiness-related activity. The longer the deviation exists in time or the greater it varies from the normal business route or in purpose from the normal business objectives, the more likely that the deviation will be characterized as major. In the case of a major deviation from the business purpose, most courts will bar compensation recovery on the theory that the deviation is so substantial that the employee must be deemed to have abandoned any business purpose and consequently cannot recover for injuries received, even though he or she has ceased the deviation and is returning to the business route or purpose.[23]

In this instance, it cannot even be said that this claimant was returning to the business route. The deviation on the dirt roads for the specific purpose of drinking beer continued to the time of the accident. The deviation from purpose here is even more marked when considering the fact Mr. Kinast made a ride available to his employees, an offer rejected by this claimant for the specific purpose of being able to drink beer while traveling. This situation is an "errand which represents an abandonment of any business purpose . . . ."[24]

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed with regard to whether claimant's travel encompassed a major deviation of purpose and claimant should be denied benefits for the injuries suffered as the result of the accident on September 12, 2003. The Board finds that claimant was an employee of respondent at the time of the accident, and that travel was an intrinsic part of claimant's employment with respondent. However, that deviation by claimant on the trip to Hutchinson, Kansas, was a major business purpose deviation, and directly affects claimant's entitlement to workers compensation benefits from this accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated June 27, 2007, denying claimant an award in this matter should be, and is hereby, affirmed.

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[23] *Kindel* at 284.

[24] *Sumner* at 291.

IT IS SO ORDERED.

Dated this ____ day of November, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

I agree with the majority's determination that claimant was engaged in a major deviation from any alleged business purpose when he suffered accidental injury and should be denied benefits as his accidental injury did not arise out and in the course of employment. But I respectfully disagree with the majority's determination that travel was an inherent part of claimant's job with respondent.

I agree with the ALJ's analysis that claimant's travel, in this instance, was no different than for any worker who is required to commute to and from work. This was a simple commute to and from an out-of-town job. K.S.A. 2003 Supp. 44-508(f) bars recovery in this instance as claimant had left his work and was returning home when the accident occurred. I would affirm the ALJ's Award in all respects.

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
Kendall R. Cunningham, Attorney for Fund
Kirk Kinast, Respondent, 1211 N. Palamio Trail, Hutchinson, KS 67502
Bruce E. Moore, Administrative Law Judge